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No. 270

IN THE

SUPREME COURT OF THE UNITED STATES

FURR'S, INC., *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for Writ of Certiorari
to the United States Court of Appeals, Tenth Circuit

Petition For Writ of Certiorari

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No._____

IN THE

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FURR'S, INC., *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for Writ of Certiorari
to the United States Court of Appeals, Tenth Circuit

Petition for Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES Furr's, Inc., Petitioner, and submits its petition for writ of certiorari and would respectfully show the following:

OPINION IN THE COURT BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported in ..... F2d ..... and appears on page 3 et seq. of the Transcript of Record which has been filed herewith.

The Opinion of the National Labor Relations Board and the Trial Examiner appear on pages 25-64 and 78-81 of the printed record, nine copies of which have been filed herewith.

JURISDICTION

The judgment of the Court of Civil Appeals affirming the order of the National Labor Relations Board

here sought to be reviewed is dated February 20, 1967, and Petitioner's Motion for Rehearing in such Court was overruled on March 24, 1967.

Jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit by writ of certiorari is conferred upon this Court by the provisions of *Title 28, U.S.C.A., Section 1254(1).*

Why a Writ Should Be Granted in This Case

A review on writ of certiorari is a matter within the Court's judicial discretion. *Rule 19, U.S. Supreme Court Rules.*

Two of the most basic and fundamental grounds for review by certiorari are present in the case at bar.

The Court has granted certiorari in numerous cases in order to resolve conflicts in the decisions of the various courts of appeals and a number of these cases have been decisions relating to the National Labor Relations Act or otherwise involving labor disputes. *American Ship Building Company vs. NLRB*, 380 U.S. 300, 13 L.Ed.2d 855, 858 (1965); *NLRB vs. Burnup & Sims, Inc.*, 379 U.S. 21, 13 L.Ed.2d 1, 3 (1964); *NLRB vs. News Syndicate Company, Inc.*, 365 U.S. 695, 6 L.Ed.2d 29, 32 (1961); *Sinclair Refining Company vs. Adkinson*, 370 U.S. 195, 8 L.Ed.2d 440, 444 (1962); *Mitchell vs. H. B. Zachry Company*, 362 U.S. 310, 4 L.Ed.2d 753, 757.

The decision of the Tenth Circuit Court of Appeals in this case conflicts with decisions of other courts of appeals in at least two instances. First, the Court

based its determination that the employer did not have a good faith doubt of the Union majority on its determination that it was responsible for 8(a)1 conduct by some of its employees. In *People's Service Drug Stores, Inc. vs. NLRB* (6th Cir., April 5, 1967), see Court's Opinion in Appendix to this brief; and also *Edward Fields, Inc. vs. NLRB*, 325 F.2d 754 (2d Cir., 1963); *NLRB vs. Dan River Mills, Inc.*, 274 F.2d 381 (5th Cir., 1960); *NLRB vs. Hannaford Bros. Co.*, 261 F.2d 638 (1st Cir., 1958); the Court held that even if the employer is guilty of unfair labor practices, this does not in itself negative a good faith doubt on the part of management. This is discussed in connection with Question One, below. Also, as stated in Question Two, the decision of the Tenth Circuit in holding Petitioner responsible for statements and actions of two of its employees is in direct conflict with *NLRB vs. J. L. Brandeis & Sons*, 145 F.2d 556 (8th Cir., 1944), cer.den. 323 U.S. 751, 89 L.Ed. 601, reh. den. 323 U.S. 815, 89 L.Ed. 648; and *NLRB vs. Tennessee Coach Co.*, 191 F.2d 546 (6th Cir., 1951); which hold that the employer is not responsible for improper and unauthorized statements of even supervisory employees, particularly where the employer has no history of labor trouble or union hostility and the employer clearly advises its employees of its policy of non-discrimination.

This Court has also granted certiorari in a number of cases involving important questions under the National Labor Relations Act. *NLRB vs. District 50, United Mine Workers*, 355 U.S. 453, 2 L.Ed.2d 401,

406 (1958); *International Association of Machinists vs. Central Airlines*, 372 U.S. 682, 10 L.Ed.2d 67, 70 (1963), rehearing denied 373 U.S. 947, 10 L.Ed.2d 702; *Retail Clerks vs. Lion Dry Goods, Inc.*, 369 U.S. 17, 7 L.Ed.2d 503, 505 (1962); *NLRB vs. Truitt Mfg. Co.*, 351 U.S. 149, 100 L.Ed. 1027, 1031 (1955); *Textile Workers vs. Darlington Mfg. Co.*, 380 U.S. 263, 13 L.Ed.2d 827, 832 (1965).

Each of the three questions presented in this case we submit is highly important with regard to the fundamental rights of individual employees under the National Labor Relations Act: (1) the right to the determination of the representation question in an NLRB supervised election by secret ballot; (2) the legality of the NLRB order entered to punish the employer for alleged unfair practices, which order in fact deprives the employees of rights expressly granted under the National Labor Relations Act in that the order compels them to be represented by the Retail Clerks' International Association when such Union has never been designated as the bargaining agent by a majority of the employees in such unit in a representation election by ballot, by valid authorization cards or in any other manner. Also, (3) the legality of the NLRB order holding the employer responsible for isolated statements and actions of minor supervisory employees when such were wholly unknown to and unauthorized by the employer, and particularly when the employer on numerous occasions had expressed its policy of non-discrimination to the employees and the Company had no history of labor troubles or Union hostility.

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

The Court of Civil Appeals erred in holding that the NLRB is not required to conduct an election by secret ballot under the provisions *Title 29, U.S.C.A., Section 159(c) (1)* when a question of representation exists.

QUESTION TWO

The Court of Civil Appeals erred in holding Petitioner responsible for the statements and actions of Amador and Harrison, and in this regard the decision of the Tenth Circuit Court of Appeals is in direct conflict with the opinions of other Circuit Courts of Appeals in the cases of *NLRB vs. J. L. Brandeis & Sons*, 145 F.2d 556 (10) (8th Cir., 1944), cer. den. 323 U.S. 751, 89 L.Ed. 601, reh. den. 323 U.S. 815, 89 L.Ed. 648; and *NLRB vs. Tennessee Coach Co.*, 191 F.2d 546 (6) (6th Cir., 1951); which hold that the employer is not held responsible for improper and unauthorized statements of even supervisory employees, particularly where the employer has no history of labor trouble or Union hostility and the employer clearly advises its employees of its policy of non-discrimination.

QUESTION THREE

The Court of Appeals erred in upholding the Order of the NLRB requiring Petitioner to bargain with the Retail Clerks' International Association as a representative of the employees when the uncontroverted evi-

dence shows that such Union does not and has never had valid representation cards of a majority of Petitioner's employees in the unit, and the Board's order is in conflict with the provisions of *Sections 159(a) and 141(b) of Title 29, U.S.C.A.*, as a matter of law.

* * * * *

STATUTORY PROVISIONS AND RULES INVOLVED

Statutory provisions and rules material to this appeal are as follows:

(1) *29 U.S.C.A., Section 159(c) (1)* (page 6 of volume of Title 29, containing Sections 159 to 160):

> "* * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

(2) *29 U.S.C.A., Section 159(a)* (page 5 of volume of Title 29, containing Sections 159 to 160):

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours or employment, or other conditions of employment: * * *"

(3) *Title 29 U.S.C.A., Section 141(b)* (page 163 of volume of Title 29, containing Sections 1 to 158):

> "It is the purpose and policy of this chapter,

* * * to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, * * *."

(4) *Title 29, U.S.C.A., Section 158(a) (1) and (5)* (page 326 of volume of Title 29, containing Sections 1 to 158):

"It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

(5) *Rule 19, U.S. Supreme Court Rules* (page 16 of 1966 Cumulative Annual Pocket Part to Title 28, U.S.C.A., containing Rules of Supreme Court):

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the courts discretion, indicate the character of reasons which will be considered:

* * * *

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; * * *."

STATEMENT OF THE CASE

The basis for jurisdiction of this case in the Court of Appeals for the Tenth Circuit is *Title 29, U.S.C.A., Section 160(f).*

The facts material to the three questions presented for review are as follows:

Board's Refusal to Conduct an Election

The Union first made its claim to represent a majority of the employees of Petitioner's grocery store in Las Cruces, New Mexico in a conversation between Harold Davis, a Union representative, and Bob Hurmence, the Petitioner's Personnel Director, on October 6, 1964, in Denver, Colorado (R 317), and again by telephone conversation between Don Miehls, another Union representative, and Don Furr, one of Petitioner's Vice Presidents, on October 8, 1964 (R 273-274).

In the conversation on October 6, Bob Hurmence told Harold Davis that based upon what he knew, he thought there should be an election, and Harold Davis stated no objection to an election procedure (R 317).

When Don Miehls called Don Furr on October 8, Don Furr told him that Las Cruces was not within his area of responsibility, that he would pass the information on to Mr. Arnold and Mr. Boverie and they would be back in touch with them the next day (R 291-292, 295-296). Don Furr discussed this call with Bob Hurmence and on October 9 Bob Hurmence called Don Miehls and also advised him that they felt there should be an election (R 318-319). The situation was

further discussed between Don Furr, Mr. Arnold, the Vice President in charge of the Las Cruces Division, and Mr. Boverie, the Senior Vice President, and in view of their doubt as to the Union majority and the misrepresentations and misinformation existing, they felt an election was necessary. Don Furr also called Don Miehls and again conveyed this information to him (R 281-283, 320, 291-292).

On Monday, October 12, 1964, Petitioner filed its petition for an election in the El Paso Office of the NLRB (R 274-275, 339-341).

On December 16, 1964, the Director of the Twenty-eighth NLRB Region dismissed Petitioner's RM Petition (R 341-342) and on January 28, 1965, the NLRB upheld the Regional Director's dismissal of the RM Petition for an Election (R 342). Petitioner appealed this refusal to conduct an election to the United States Court of Appeals for the Tenth Circuit, which sustained the NLRB's motion to dismiss on the ground that the Board's order was not a final order. *Furr's, Inc. vs. NLRB*, 350 F.2d 84 (10th Cir., 1965).

After a hearing on the unfair labor practice charges the Trial Examiner ordered Petitioner to bargain with the Union without the holding of an election (R 24-64), which order was affirmed by the NLRB (R 78-81). The Tenth Circuit in its decision herein (Transcript of Record p. 3) has upheld the Board's order requiring Petitioner to bargain with the Union without any election ever having been conducted.

Statements and Conduct of Amador and Harrison

The evidence is without dispute that the Company policy, in fact and as stated to the employees on several occasions by the Store Manager, Harold Ellington and Petitioner's Vice President, A. R. Arnold, was one of nondiscrimination on account of any Union activity or membership. The evidence further shows without dispute that there were only a few isolated incidents involving Amador and Harrison; that the majority of these incidents took place after the employees had already signed the representation cards relied upon by the Board; that such statements and conduct were such employees' own personal opinion and conduct, were contrary to Petitioner's policy, and were unknown to and unauthorized by Petitioner.

The Company policy of Petitioner, Furr's, Inc., as stated by the Company's Personnel Director, Bob Hurmence; Vice Presidents Don Furr and A. R. Arnold; and the Store Manager, Harold Ellington, was that the employees have the complete freedom of choice with regard to Union organization and membership and that there would be no discrimination against any employee on account of his Union memberships or beliefs (R 316, 291-292, 294, 275-276, 303).

The evidence also shows without dispute that the employees were advised of this policy by the Store Manager, Harold Ellington, and by Mr. Arnold, the Vice President in charge of the Division, on several occasions both before and after the alleged conduct of Amador and Harrison (R 303, 312-313, 275-276, 128, 135-136, 156, 189-190, 227). This was confirmed by a

number of the employees: Martha McLain (R 128), Jimmy Nevarez (R 135-136), Ida Leyva (R 156), Shirley Wellborn (R 189-190), and Vera Witherwax (R 277) and there is no testimony to the contrary.

The testimony is undisputed that these statements of Amador and Harrison were contrary to Company policy and were unknown to and unauthorized by the Company, and there is not one line of testimony to the effect that these statements and actions of Amador and Harrison constituted anything other than personal opinions and were in any way authorized by the Company. Jerry Aaron testifying in regard to the statements made by the Drug Department head, Ernie Butler, testified specifically that he understood that Butler should not have made these statements and was not authorized by Furr's to make such statements (R 111-112).

The evidence further shows no history of labor troubles or Union hostility. The undisputed evidence shows that in the past on several occasions Petitioner has recognized this same union, the Retail Clerks' Union, and even entered into contracts with the Union without an election where the Company was satisfied that the majority of the employees in the store did, in fact, desire to be represented by the Union. This occurred in Artesia and Santa Fe, New Mexico (R 294-295). The evidence also shows that the Company has existing contracts with the Retail Clerks' Union in Albuquerque, Santa Fe and Carlsbad, New Mexico, and in Denver, Colorado (R 294-295, 316).

Union Has Never Had a Majority of Valid Representation Cards

The undisputed evidence shows that a number of cards were invalid because the signatures were obtained by misrepresentations concerning the card and that because of such misrepresentations and misinformation the Union at no time has ever had valid cards of a majority of the employees.

Mary Jackson testified that she had been tricked into signing the card by the Union representative in that she was told she was only signing an attendance record for the meeting (R 115-116).

Joe Archuleta testified that he signed the card on the statement and understanding from the statement of the Union representative that they were for an election (R 167). He further testified that about seven cards were signed at a meeting conducted at Jerry Aaron's house in which the employees were told that the purpose of signing the cards was to have an election to vote on this question (R 167-168). The following employees testified that they did sign their card at this meeting at Aaron's house upon the representation that the purpose of the cards was for an election: Louis Delgado (R 121), Johnny Montoya (R 233), Felix Montoya (R 209-210), Carlos Holguin (R 261).

With regard to the card of Manuel Gutierrez, the evidence not only shows that the representation was made to him that they were going to have an election and everyone was going to vote (R 217) but that the card was not even signed by him because he did not

know how to read or write (R 216).

Vera Witherwax testified that she was told that there would be an election (R 226).

Harold Don Mims testified that he signed the card upon the representation that the card would just express a preference and was not binding (SF 96); and that Tony Gonzalez and Rufus Brunson were also signed up on the representation that the card would not be binding on them and by signing the card they would have an election (R 97-98).

Gilbert Chavarria signed the card on the representation that its purpose was for an election (R 147), as did Fred Ruiz (R 142).

The employees, Sammy Chavez, Henry O'Neil and Luis Samanego testified that they understood that the cards were to be used for obtaining an election (R 214, 207-208, 152).

Representations were made to the employees in the Meat Department that the Amalgamated Meat Cutters' Union would be brought in for the employees in the Meat Market and the testimony further shows that three of such employees did in fact sign cards with the Amalgamated Meat Cutters' Union later in October of 1964. Employees testifying in this regard were Jimmy Nevarez (R 134-135), Shirley Wellborn (R 187-188), Erlinda Rodriguez (R 204-205), and Donna Harwood (R 222).

The evidence further shows without dispute that at the time most of the representation cards were

signed there were misrepresentations made and much misinformation among the employees signing the cards in connection with the discharge of an employee named Joe Barreras. Barreras was discharged for appropriation of Company funds in the latter part of September when the Union drive was being conducted (R 272-273, 302-303). The store manager, Harold Ellington, was aware of misrepresentations and misinformation among the employees concerning the discharge and so advised his superior, Mr. A. R. Arnold, Vice President. Several employees testified regarding the misinformation and misrepresentations concerning the Barreras discharge and its effect upon the signing of the cards. Gilbert Chavarria testified that some cards were signed at a meeting on September 29 because of the employees' feeling over the Barreras' discharge and that if he and the other employees had known the true facts (i.e., that Barreras was taking money and had admitted taking money) that the cards would not have been signed (R 147-150). Testimony of other employees concerning the Barreras matter appears at pages 158, 147, 179-180.

ARGUMENT AND AUTHORITIES

QUESTION ONE RESTATED

The Court of Civil Appeals erred in holding that the NLRB is not required to conduct an election by secret ballot under the provisions *Title 29, U.S.C.A., Section 159(c) (1)* when a question of representation exists.

ARGUMENT AND AUTHORITIES UNDER QUESTION ONE

The Court of Civil Appeals in this case, relying primarily upon *James H. Matthews & Co. vs. NLRB*, 354 F.2d 432 (8th Cir., 1965), held that an election by secret ballot was not necessary and that the Retail Clerks union was established as the employees' representative by cards signed by some of the employees over Petitioner's insistence on the statutory provision for an election by secret ballot when a question of representation exists.

We respectfully submit that this decision by the Eighth and Tenth Circuit Courts of Appeals is incorrect and deprives the individual employees of their right to an election by secret ballot, which is a valuable and fundamental democratic right clearly and expressly provided in *Title 29, U.S.C.A., Section 159(c) (1)*.

It appears that prior to 1947, *Title 29, U.S.C.A., Sec. 159(c) (1)* authorized the Board "to take a secret ballot of employees, *or utilize any other suitable method to ascertain such representatives.*" (Emphasis ours) See *NLRB vs. A. J. Tower Co.*, 329 U.S. 324,

91 L.Ed. 322, 327 (1946); *Marlin-Rockwell Corp. vs. NLRB*, 116 F.2d 586, 588 (2d Cir., 1941), cer. den. 313 U.S. 594, 85 L.Ed. 1549 (1940).

Title 29, U.S.C.A., Section 159(c) (1) was subsequently amended and now provides: "If the Board finds upon the record of such hearing that such a question of representation exists, *it shall direct an election by secret ballot and shall certify the results thereof.*" The Act now gives the Board no discretion or alternative procedures whatsoever in the event a question of representation exists. The provision, with no "ifs, ands or buts," requires the Board to direct an election by secret ballot and certify the results thereof. The Act does not provide that the Board is not required to direct an election in the event the Board is satisfied that the Union has obtained a majority of representation cards of the employees or for some other reason decides that an election is not necessary, as some of the Courts of Appeals have held.

A number of decisions by other Courts of Appeals subsequent to the amendment of the Act have referred to the discretion resting in the Board *in the manner of conducting an election*, but without in any way stating or indicating the Board has discretion as to whether or not an election should be held where the question of representation exists. *National Labor Relations Board vs. Wilkening Mfg. Co.*, 207 F.2d 98 (3d Cir., 1953); *National Van Lines, Inc. vs. NLRB*, 273 F.2d 402 (4) (7th Cir., 1960); *NLRB vs. Blades Mfg. Corp.*, 344 F.2d 998 (1) (8th Cir., 1965).

In *NLRB vs. Wilkening Mfg. Co.*, 207 F.2d 98, 100

(3d Cir., 1953), the Court said:

> "The Board admittedly has a wide discretion in the conduct of an election under the Act but it must function' * * * in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.' * * *"

The only exception to the statutory provision for an election is in *Subdivision 3 of Section 159(c)*, which provides that no election shall be directed in a bargaining unit in which a valid election has been held in the preceding twelve-month period. The twelve-month provision is obviously intended to insure some degree of stability and a reasonable period of bargaining once the representative has been selected in a valid election and is a further indication of the Congressional intent that the bargaining representative be designated by the employees at an election by secret ballot.

We respectfully submit that Congress meant what it said when it directed the Board to direct an election by secret ballot. One need only examine the decided cases to see the reason and the wisdom behind the requirement of an election. It appears from examples in numerous cases that the employee frequently is not fully or even partially aware of the meaning and significance of signing a Union authorization card even in cases where the wording is less ambiguous than in many of the cards. Of course, the language of the card itself is frequently reasonably susceptible to more than one interpretation. The cards are often signed upon misrepresentations of Union officials, while the employee is under the influence of some pre-

judicial or inflammatory statements or, in many cases, under express or implied threats or coercion. Even where no express or implied coercion exists, the employee himself may have a fear, however unfounded, of coercion or reprisals if he does not sign a card.

In a Board-supervised election these dangers, or possibilities of such dangers, are eliminated. Since the election is by secret ballot, no one will ever know the employee's vote, and this eliminates any possibility of coercion or even a feeling of coercion by the employee, either from the Union or the Company. Likewise, the probability of the employee's decision being influenced by any misrepresentation or misunderstanding is greatly reduced. In an election the employee has the clear choice before him as to whether he wants the Union to represent him (of course, in some cases, which Union he wants to represent him) or whether he desires no Union at all. In an election the employee is fully aware that he is making a choice and that the choice of the majority of the employees will prevail.

This was well and succinctly summarized by the Second Circuit in *NLRB vs. Flomatic Corporation*, 347 F.2d 74, 78 (2d Cir., 1965), as follows:

> "* * * But the only evidence of the union's majority status is the fact that twenty of the twenty-eight employees signed authorization cards a month before the election. Such cards, by the Board's own admission, are a 'notoriously unreliable method of determining majority status of a union * * *' Sunbeam Corp., 99 N. L. R. B. 546, 550-51 (1952); Midwest Piping & Supply Co., Inc., 63 N. L. R. B. 1060 (1945). * * *"

We, therefore, respectfully urge the court to grant this Petition for Writ of Certiorari and expressly hold that the employer and the employees are entitled to an election by secret ballot and the employees cannot be compelled to be represented by a Union merely upon the Board's determination that such Union has secured representation cards of a majority of the employees.

We would also briefly point out the conflict in the decision of the Tenth Circuit on the question of the right to an election with the decisions of other courts of appeals. The record is replete with testimony that at all times the Petitioner had a good faith doubt that the Union ever had a majority of the employees. However, the Court upheld the finding that there was no good faith doubt on the basis of their prior action in upholding the finding that the employer was guilty of 8(a)1 conduct, which was the actions of Amador and Harrison. The Court, quoted with approval from another decision that "by its clearly established 8(a)1 violations it (the employer) is barred from asserting a good faith, although erroneous doubt." This is in direct conflict with the holding of the Sixth Circuit in *People's Service Drug Stores, Inc. vs. NLRB*, (April 5, 1967), Opinion attached in Appendix. At the time of the printing of this brief the Opinion had not yet appeared in the Federal 2d Advance Sheets. This case is very closely parallel with the case at bar, including the fact that the Union there made misrepresentations concerning the use of the cards for an election, the fact that in previous instances where a card check was refused and an election held the

Union lost the election, etc. The Sixth Circuit, upheld the finding that the employer was guilty of 8(a)1 conduct. However, in denying the portion of the Board's Order requiring the employer to bargain collectively with the Union, the Court said:

> "* * * The mere fact that Peoples was guilty of unfair labor practices in connection with the union organizational campaign is not sufficient in and of itself to negative a doubt on the part of management. Edward Fields, Inc. vs. N.L.R.B. supra; N.L.R.B. v. Dan River Mills, Inc., 274 F.2d 381 (C.A. 5); N.L.R.B. v. Hannaford Bros. Co., 261 F.2d 638 (C.A. 1)."

QUESTION TWO RESTATED

The Court of Civil Appeals erred in holding Petitioner responsible for the statements and actions of Amador and Harrison, and in this regard the decision of the Tenth Circuit Court of Appeals is in direct conflict with the opinions of other Circuit Courts of Appeals in the cases of *NLRB vs. J. L. Brandeis & Sons*, 145 F.2d 556 (10) (8th Cir., 1944), cer. den. 323 U.S. 751, 89 L.Ed. 601, reh. den. 323 U.S. 815, 89 L.Ed. 648; and *NLRB vs. Tennessee Coach Co.*, 191 F.2d 546 (6) (6th Cir., 1951); which hold that the employer is not held responsible for improper and unauthorized statements of even supervisory employees, particularly where the employer has no history of labor trouble or Union hostility and the employer clearly advises its employees of its policy of non-discrimination.

ARGUMENT AND AUTHORITIES UNDER QUESTION TWO

Petitioner is well aware of the cases holding that the common law rules relating to principal and agent are not applicable, and that even though the supervisor may not be authorized to do certain things, the employer may be responsible for such actions when the employees, based upon just cause, believe that the supervisor was acting for and on behalf of the company. *Irving Air Chute Company, Inc. vs. NLRB*, 350 F.2d 176, 179 (2d Cir., 1965). However, these cases are of no benefit whatever to Respondent in the case at bar because the undisputed evidence shows that the statements and actions of Amador and Harrison were contrary to Company policy and there is not one line of testimony by any employee that any employee believed that in making such statements Amador and Harrison were acting for and on behalf of the Company and were doing anything other than expressing their own personal feelings.

We respectfully submit that the decision of the Court of Civil Appeals in this regard in holding that such personal opinions and statements constituted unfair labor practices by Petitioner is not only contrary to the decisions of other Courts of Appeals but is wholly unjust.

In *NLRB vs. J. L. Brandeis & Sons*, 145 F.2d 556, 567 (8th Cir., 1944), cer den. 323 U.S. 751, 89 L.Ed. 601, reh. den. 323 U.S. 815, 89 L.Ed. 648, the Court held:

"The Board contends that respondent is respon-

sible for remarks of certain of its minor supervisory officers which are claimed to indicate hostility on the part of respondent toward the union. In considering these remarks it must be borne in mind that respondent had consistently proclaimed, both by spoken and written words, its fixed policy that employees were free to join or not to join a union and to vote accordingly without fear of reprisals from respondent. * * * The question of law is presented whether respondent should be bound by the chance remarks of subordinates in view of its pronounced policy. It has no history of labor troubles nor union hostility. Its expressed attitude, reiterated many times, advised the employees in unmistakable terms that they might, without fear of reprisals, exercise absolute freedom of choice in their actions and opinions on labor matters. * * * When, as here, an employer has clearly defined his attitude of noninterference, the expressions of minor supervisory employees to the contrary must be regarded as their individual views—they speak without authority from their employer. * * *"

And in *NLRB vs. Tennessee Coach Co.*, 191 F.2d 546, 554 (6th Cir., 1951), the Court held:

"Whether acts of supervisory employees constitute restraints upon union activity on the part of a company must be viewed, to a large extent, against the background of the company's attitude, policy, and practice in the past with regard to such matters. Where an employer has no history of labor trouble or union hostility, and repeatedly advised its employees, in unmistakable terms, that they might, without fear of reprisal, exercise freedom of choice in their actions and opinions on labor matters, expresions of union hostility

> by some of the supervisory employees are to be regarded as the individual views of such employees, rather than as the views of the employer. National Labor Relations Board v. J. L. Brandeis & Sons, 8 Cir., 145 F.2d 556. * * * In National Labor Relations Board v. Hinde & Dauch Paper Co., 4 Cir., 171 F.2d 240, where it appeared that a foreman had inquired of an employee how she intended to vote, and stated to another employee that if the plant was organized, the owner would close it down, the court denied enforcement of the Board's order based on such statement and inquiry, on the ground that there was nothing to show that they were made with the approval of the management or that they constituted part of a program of intimidation."

See also *Humble Oil & Refining Co. vs. NLRB*, 113 F.2d 85, 92 (9) (5th Cir., 1940), and *NLRB vs. Whittier Mills Co.*, 111 F.2d 474, 479 (5th Cir., 1940).

The record shows that Petitioner has no history of Union hostility or labor troubles, the statements of Amador and Harrison were clearly their own personal opinions and made without the knowledge, authorization or approval of Petitioner, and there is not one line of testimony that any employee considered such statements or actions as being authorized by the Company or reflecting Company policy, and on numerous occasions both prior and subsequent to these actions the Petitioner through its Division Vice President and Store Manager repeatedly advised the employees of the Company's policy of non-intereference and non-discrimination on account of Union activity. Thus, the Board erred in holding as a matter of law that these actions constituted unfair labor practices by Petitioner.

QUESTION THREE RESTATED

The Court of Appeals erred in upholding the Order of the NLRB requiring Petitioner to bargain with the Retail Clerks' International Association as a representative of the employees when the uncontroverted evidence shows that such Union does not and has never had valid representation cards of a majority of Petitioner's employees in the unit, and the Board's order is in conflict with the provisions of *Sections 159(a) and 141(b) of Title 29, U.S.C.A.*, as a matter of law.

ARGUMENT AND AUTHORITIES UNDER QUESTION THREE

In this case the Court of Appeals has upheld the Board order requiring Petitioner to bargain with the Retail Clerks' union even though the undisputed evidence shows that the Union does not and has never represented a majority of Petitioner's employees. We respectfully submit that this is a denial of the employees' rights expressly granted under the National Labor Relations Act and an invalid order as a matter of law.

First, it might be helpful to restate the reasons apparently relied upon by the Court in upholding this order. The Court of Appeals cites *Jas. H. Matthews & Co. vs. NLRB*, 354 F.2d 432 (8th Cir., 1965) for the proposition that an election is not the exclusive instrumentality by which a union's representative status may be established. We submit that this decision is erroneous, as already discussed under Question One, above. However, in any event, such cases have

no application here because the Union never at any time even had a majority of valid representation cards.

The Tenth Circuit also cites the general proposition that "it is the function of the Board, not the Courts, to determine how the effect of prior unfair labor practices may be expunged," citing *NLRB vs. Hamilton*, 220 F.2d 492 (10th Cir., 1955). This, of course, may be valid as a general proposition but certainly gives the Board no authority to enter an order contrary to the express provisions of the Act. This is not a case such as *NLRB vs. Hamilton*, 220 F.2d 492, or *Franks Bros. Co. vs. NLRB*, 321 U.S. 702, 88 L.Ed. 1020 (1943), in which the Union had a majority and subsequently lost its majority. In the case at bar the Union has never had a valid majority.

The Board cannot enter an order to achieve ends other than those which can fairly be said to effectuate the policies of the Act and, of course, can not enter an order which is in conflict with the Act. *NLRB vs. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 97 L.Ed. 377 (3) (1953); *NLRB vs. American Dredging Company*, 276 F.2d 286 (3) (1960); *Fibreboard Paper Products Corporation vs. NLRB*, 379 U.S. 203, 13 L.Ed.2d 233 (10) (1964).

We submit that it is clear under the Act that an order entered for the purpose of punishing the employer by compelling it to bargain with a union is invalid because it deprives the employees of the right to be represented by the union organization or person which a majority of such employees have selected

either by an election, by valid representation cards or otherwise.

One of the express purposes of the Act is "to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce." *29 U.S.C.A., Section 141(b).* And *Title 29, U.S.C.A., Section 159(a)* provides:

> "Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or the conditions of employment: * * *" (Emphasis ours)

As stated in *NLRB vs. H. Rohtstein & Co.*, 266 F.2d 407, 410 (1st Cir., 1959):

> "It seems clear that there can be no refusal to bargain in violation of Section 8(a) (5) on the part of an employer if the purported representative of his employees was not *freely designated* as such by the majority of his employees in the appropriate bargaining unit." (Emphasis ours)

See also *NLRB vs. I. Posner, Inc.*, 342 F.2d 826 (4) (2d Cir., 1965), cer. den. 382 U.S. 837, 15 L.Ed.2d 79; *NLRB vs. Richard W. Kaase Co.*, 346 F.2d 24 (7) (6th Cir., 1965); *NLRB vs. Peterson Bros., Inc.*, 342 F.2d 221 (5) (5th Cir., 1965).

In *National Labor Relations Board vs. Wilkening Mfg. Co.*, 207 F.2d 98, 102 (3rd Cir., 1952), the

Court said:

> "A review of the record in this case persuades us that the petition for enforcement should be denied. In so concluding we reiterate the views we expressed in NLRB v. Globe Automatic Sprinkler Co., 3 Cir., 1952, 199 F.2d 64, 70:
>
> "'In our opinion, it would be inconsistent with the principles of equity if, under the circumstances stated, we should grant the Board's petition for enforcement.
>
> "'Further, to sustain the Board's position here would be violative of the spirit and the very letter of the National Labor Relations Act. The latter, in its declaration of policy, asserts that the purpose of the Act is to protect "* * * the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C.A. § 151 et seq.'"

And, in *NLRB vs. Flomatic Corporation*, 347 F.2d 74, 78 (2d Cir., 1965), the Court said:

> "* * * That section protects the right of employees to join or refrain from joining labor organizations. And that right is implemented by § 9(c) (1) which provides for representation elections by secret ballot. Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act."

Representation cards are invalid when signed upon a representation and understanding that they are to be used only to obtain an election. *NLRB vs. Koehler*, 328 F.2d 770 (1) (7th Cir., 1964); *Happach vs. NLRB*, 353 F.2d 629 (1) (7th Cir., 1965). See also *Bauer Metal & Welding Fabricators, Inc. vs. NLRB*, 358 F.2d 766 (5) (8th Cir., 1966). As discussed in the Statement of the Case, above, the following employees signed the cards upon the representation that the purpose of the card was to obtain an election: Joe Archuelta, Louis Delgado, Johnny Montoya, Felix Montoya, Carlos Holguin, Vera Witherwax, Gilbert Chavarria, and Fred Ruiz. *There is no testimony by these employees that they were told that the card was to be used for any purpose other than to obtain an election.*

Mary Jackson testified that she had been tricked into signing the card by the Union representative and she had been told that she was only signing an attendance record for the meeting.

Manuel Gutierrez testified that the card with his name was signed by somebody else because he did not know how to read or write and he was also told there was going to be an election.

Harold Mims, Tony Gonzalez and Rufus Brunson signed the cards upon the representation that they would not be binding and that there would be an election.

Sammy Chavez, Henry O'Neil and Louis Samamiego testified they understood that the cards were to be used for obtaining an election.

In many cases the circuit courts have set aside the Board's order to insure that the desire of the majority of the employees was upheld and that the apparent Union majority was not the result of misrepresentations, inflammatory statements, etc. by the Union. In *NLRB vs. Bonnie Enterprises, Inc.*, 341 F.2d 712, 714 (4th Cir., 1965), the Court said:

> "While we recognize the considerable discretion with which the Board has been entrusted, it is proper to observe that with discretion goes responsibility. * * * It follows that the enforcement of the order of the Board should be denied, because of the impropriety of this piece of campaign literature which was sufficient to mislead the elector when casting their votes."

See also *NLRB vs. Schapiro & Whitehouse, Inc.*, 356 F.2d 675 (4th Cir., 1966).

In summary, the record clearly shows that a majority of the employees have never freely and knowingly designated the Union as their representative by valid representation cards or in any other manner and that the failure of the Union to obtain or have a majority is wholly unrelated to any act of Petitioner or even to any act of Amador and Harrison.

The clear and express purpose of the Act is to safeguard and protect the rights of the employees, particularly with regard to their right to be represented in collective bargaining by the person, persons or organization freely selected by a majority of the employees in the unit involved without being influenced by misrepresentations of the organization seeking to

represent them. By ordering Petitioner to bargain with the Retail Clerks' International Association as the representative of these employees the Board has denied the employees of the right to be represented by the representative of their choice and has compelled them to be represented by a Union when the majority of the employees has never validly designated such Union as their bargaining representative. We respectfully submit that the Board's Order is contrary to the clear and express intent and purposes of the National Labor Relations Act.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that the Court reverse the judgment of the Court of Appeals and the Order of the National Labor Relations Board and direct the Board to conduct an election in the unit so that the employees may be represented by the organization validly selected by a majority of such employees.

Respectfully submitted,

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By:_____

Attorneys for Petitioner,
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CERTIFICATE OF SERVICE

A copy of the above and foregoing Petition for Writ of Certiorari has been deposited in a United States mailbox with first-class postage prepaid, addressed to the following:

Lewis S. Harris, Esq.
Counsel for General Counsel
National Labor Relations Board
500 Gold Avenue S.W.
Albuquerque, New Mexico 78101

Mr. Don R. Miehls
Retail Clerks' International Ass'n,
Local Union No. 462
Post Office Box 1596
Carlsbad, New Mexico

A copy of the above and foregoing Petition for Writ of Certiorari has been deposited in a United States mailbox with air mail postage prepaid, addressed to the following:

Solicitor General
Department of Justice
Washington 25, D. C.

Mr. Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
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Washington, D. C. 20570

Mr. Donald E. Carter, Tenth Vice President
Director of Southwestern Division
Retail Clerks' International Ass'n, AFL-CIO
5250 Santa Monica Blvd., Suite #304
Los Angeles, California 90029

all on this the ..... day of ....., 1967.

WILLIAM L. KERR, *one of the attorneys for Petitioner, Furr's, Inc.*

APPENDIX

DECISION OF SIXTH CIRCUIT COURT OF APPEALS IN CASE OF PEOPLES SERVICE DRUG STORES, INC. v. NLRB

No. 16861

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Peoples Service Drug Stores, Inc., Petitioner,

v.

National Labor Relations Board, Respondent.

On Petition to review a decision of the National Labor Relations Board and upon answer of the Board for enforcement of its Order.

Decided April 5, 1967.

Before: PECK and McCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. Peoples Service Drug Stores, Inc., petitioned the Court to review and set aside an order of the National Labor Relations Board issued against it on September 28, 1965. (Section 160(f), Title 29, U.S.C.) The Board's Decision and Order are reported at 154 NLRB No. 118. The Board in its answer seeks enforcement of the Order.

Peoples Service Drug Stores, Inc., hereinafter referred to as Peoples, operates a chain of drug stores in the greater Akron area of Akron, Ohio. Retail Clerks International Association, Local 698, AFL-CIO, hereinafter referred to as the Union, began a campaign for

the organization of the employees of Peoples in April, 1964. Peoples was opposed to union organization. This was made clear in a meeting Richard J. Weaver, District Manager, had with the store managers on May 7th. He directed them to interview each of their employees and to emphasize the existing benefits of their employment and to point out the burdens of union membership. He gave them a list of "dos" and "don'ts" (General Counsel's exhibit No. 4) that they could use in discussing union organization with the employees.

The Board adopted as its order the recommended order of the Trial Examiner. The Trial Examiner found fourteen violations of Section 8 (a) (1) of the Act. (Section 158 (a) (1), Title 29, U.S.C.) These all involved statements made by store managers to employees. One of these concerned coercively interrogating Mary Davidson about her attendance at union meetings. The others were in connection with statements made by store managers, either to or in the presence of employees, to the effect that employees would be discharged, part time help would be eliminated, current benefits would be withdrawn, some advantageous working conditions would be eliminated, Peoples would sell its stores, etc., if the Union became the bargaining agent.

It is not denied that these statements were made by the managers or that they would constitute violations of Section 8 (a) (1) of the Act. It is claimed on behalf of Peoples that these statements were made by store managers in opposition to an effort to organize

them and that they were not made under authority of top management. There had been an effort to organize the pharmacists of the area but the Trial Examiner found that it had been abandoned and was not being carried on at the time the campaign to organize the employees was being conducted. The managers of the stores were pharmacists and had been invited to join the Union. Being objects of union organization, they had a right to express their opinion. The Board claims that they went further than the mere expression of opinion and expressed company policy.

The Trial Examiner found that the evidence did not support this claim of Peoples. We agree. There was substantial evidence to support the findings of the Trial Examiner that the statements of the store managers were made to discourage the employees from joining the Union, a right guaranteed by Section 7 of the Act. (Section 157, Title 29, U.S.C.)

> "The findings of the Board with respect to questions of fact if supported by substantial evidance on the record considered as a whole shall be conclusive." Section 160 (e), Title 29, U.S.C. See, Universal Camera Corporation v. Labor Board, 340 U.S. 474; Labor Board v. Denver Bldg. Council, 341 U.S. 675.

Peoples objected to the inclusion and exclusion of certain persons in the appropriate unit for collective bargaining as approved by the Board. At the hearing before the Trial Examiner, the General Counsel objected to a total of nine persons who were included in the unit. As the hearing progressed, the General

Counsel withdrew his objections to six of these persons and only three persons are now involved in this alleged error. The Examiner found that Kunstek, at store No. 144, and Kelly, at store No. 235, designated as "Foods Managers" on Peoples' payroll, were supervisors and therefore not includable in the appropriate unit. By definition, "supervisors" *1/* are not included in the term "employees," *2/* Sections 152 (11) and (3), Title 29, U.S.C., and if Kunstek and Kelly were supervisors, they were properly excluded from the bargaining unit.

Whether an employee is a supervisor or not is a question of fact, and the Board's resolution of the issue is conclusive if supported by substantial evidence. N.L.R.B. v. Ertel Manufacturing Corporation, 352 F.2d 916 (C.A. 7). cert. den., 383 U.S. 945; Eastern Greyhound Lines v. N.L.R.B., 337 F.2d 84 (C.A. 6); N.L.R.B. v. Griggs Equipment, Inc., 307 F.2d 275 (C.A. 5); Northern Virginia Steel Corporation v. N.L.R.B., 300 F.2d 168 (C.A. 4). The evidence shows that they receive ten to twenty cents more an hour than other food counter employees, and that they participate in a bonus based upon the gross volume of the food counter business.

1/ "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

This is in addition to the regular Christmas bonus received by all employees. These food managers interview applicants for jobs and, although their decisions are not final, their recommendations are generally followed by the store managers. The food managers instruct the employees in their duties, assign employees to their particular stations, and make up the weekly work schedules. If an employee desires time off or desires to switch assignments, such requests are made of the food managers, who sometimes decide the requests without consulting the store managers. The food managers are responsible for preparing the orders for food supplies, which are then, often routinely, reviewed by the store managers.

Peoples does not deny that the food managers perform these functions, but claims that they are under the supervision and direction of the store managers and assistant managers, and hence are not "supervisors." The fact that one is acting under delegated authority and may have his decisions reviewed by a superior, does not mean that a person is not a "supervisor" if he performs any of the functions enumerated in the statutory definition of "supervisor." Eastern Greyhound Lines v. N.L.R.B., supra. We conclude that there was substantial evidence to support the Board's finding that Kunstek and Kelly were "supervisors"

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authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

2/ "(3) The term 'employee' shall include any employee, * * * but shall not include * * * any individual employed as a supervisor, * * *"

and hence not includable in the appropriate bargaining unit.

Peoples also objects to the inclusion in the unit of Charles Henderson. Charles Henderson was a part-time employee who worked in the place of his brother Jerry Henderson, while he was out sick. The Examiner included Jerry Henderson in the unit for the June 6th payroll period but not for the July 4th period. Charles Henderson was included in the unit for only the July 4th period. We conclude that his inclusion in the unit for the July 4th period is supported by the evidence.

On June 3, 1964, the Union wrote to District Manager Weaver that a majority of Peoples' employees in the Greater Akron area had designated the Union as their collective bargaining representative. The letter requested recognition, described the unit and proposed a meeting for June 9th. It was also proposed in the letter that the Union and Peoples have an impartial person check the Union's signed authorization cards against a company payroll list. Mr. Weaver responded to this letter on June 5th, as follows:

> "Please be advised that this company has a good faith doubt that your union represents the majority of its employees in any appropriate unit [and] we must decline recognition.
>
> "We suggest that you take your claim to the N.L.R.B. in order that it may hold a secret ballot election.
>
> "Card checks to determine majority status have always proven unreliable. They can never

be an alternative to the democratic process of a secret ballot election.

"Therefore, we must decline your suggestion for a card check."

The campaign for members continued throughout June and on June 24th the Union presented a letter at a Union meeting and requested the employees to sign it. The letter reads, in part, as follows:

"We the undersigned employees, members of Retail Clerks Union Local No. 698, are in receipt of your letter dated June 5, 1964, in which you state that you have a good-faith doubt of our union's majority status, and decline recognition of same.

"We the undersigned wish to make it known to you that we have freely signed authorization cards of membership authorizing the Retail Clerks Union to be our collective-bargaining representative.

* * * *

"The union representatives have suggested that in seeking a contract with our company we should use good judgment, and ask only for fair wages, fair hours, fair working conditions. . . . We the undersigned subscribe to our union representatives' suggestions . . . and hereby adopt them as our proposal of a contract.

* * * *

"We feel that our company's refusal to recognize our union is based on fear, mistrust, and misunderstanding that can only be relieved by a meeting between our company representatives and our union representatives.

> "We ask that a meeting take place on July 15, . . . We believe that such meetings can achieve an agreement that is at once both fair to the company and fair to the employees."

Additional copies of this letter were signed by other employees in the days following. Weaver received these letters about June 30th. Copies of the signed letters were also sent to Peoples' store managers. These letters were purportedly signed by seventy-three employees.

Mr. Weaver responded to this letter on July 6th and said that several of the signers had reported to the management that the letter did not state their true desires and that they signed the letter under persuasion of other employees. Mr. Weaver said further that Peoples was still not satisfied that the Union represented a majority of the employees. It was suggested that the Union resort to the Board to have the issue determined. In August a letter was written on behalf of Peoples to all of its employees. They were reminded that at no time had the Union requested the Board to hold an election. It was stated in the letter that Peoples had filed a petition with the Board requesting an election. The letter further states, "All we have ever wanted was an election . . . How much longer will the Union continue to block your right to vote?"

The Trial Examiner recommended and the Board found that Peoples violated Section 8 (a) (5) and (1), (Section 158 (a) (5) and (1), Title 29, U.S.C.)

by refusing to recognize and bargain with the Union after June 3, 1964. Section 159 (a) provides,

> purpose of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ."

It is provided in Section 159 (c) (1) (B) that if upon a hearing the Board finds that a question of representation exists, "it shall direct an election by secret ballot and shall certify the results thereof." If a company has a good faith doubt that a Union has authorization cards signed by a majority of the employees, the Board should not order the employer to recognize the union but should order an election. Whether an employer entertained a good faith doubt as to a union's claim that it represented a majority of his employees is a factual issue to be decided on the facts presented in each particular case.

Appellate courts, in reviewing the facts of particular cases in order to determine whether there is substantial evidence to support findings of employers' lack of good faith, have both reversed and affirmed Board orders. In the following cases the Courts, contrary to Board determinations, have found that there was a good faith refusal to extend recognition. Pizza Products Corporation v. N.L.R.B., 369 F.2d 431 (C.A. 6); N.L.R.B. v. Great Atlantic & Pacific Tea Co., 346 F.2d 936 (C.A. 5); Fort Smith Broadcasting Co. v. N.L.R.B., 341 F.2d 874 (C.A. 8); Edward Fields, Inc. v. N.L.R.B., 325 F.2d 754 (C.A. 2). The following

cases affirmed the Board's findings of lack of good faith. N.L.R.B. v. Cumberland Shoe Corporation, 351 F.2d 917 (C.A. 6); N.L.R.B. v. Winn-Dixie Stores, Inc., 341 F.2d 750 (C.A. 6), cert. den. 382 U.S. 830; N.L.R.B. v. Philamon Laboratories, Inc., 298 F.2d 176 (C.A. 2), cert. den., 370 U.S. 919; N.L.R.B. v. Trimfit of California, 211 F.2d 206 (C.A. 9).

The specific question before us is whether there was substantial evidence to support the finding of the Trial Examiner that there was no foundation for Peoples' alleged doubt that the union had a majority of its employees who desired representation by the union. The mere fact that Peoples was guilty of unfair labor practices in connection with the union organizational campaign is not sufficient in and of itself to negative a doubt on the part of management. Edward Fields, Inc. v. N.L.R.B., supra; N.L.R.B. v. Dan River Mills, Inc., 274 F.2d 381 (C.A. 5); N.L.R.B. v. Hannaford Bros. Co., 261 F.2d 638 (C.A. 1).

The Examiner argues that if the management of Peoples had any doubt that the Union had a majority, a card check would have resolved that issue. We do not think this necessarily follows. A check of union authorization cards, allegedly signed by a majority of employees, is not necessarily determinative. An employer need not require a card check where he has a reasonable basis for believing that the cards do not reflect the uncoerced choice of his employees or that the employees signed the cards under a mistaken notion as to their full import. N.L.R.B. v. Flomatic Corporation, 347 F.2d 74 (C.A. 2); N.L.R.B. v. Great

Atlantic & Pacific Tea Company, supra; N.L.R.B. v. Johnnie's Poultry Co., 344 F.2d 617 (C.A. 8); N.L.R.B. v. Koehler, 328 F.2d 770 (C.A. 7). The procedure of determining the majority status of a union by presentation of individually solicited authorization cards rather than by vote in a Board supervised election, has been described as a " 'notoriously unreliable method of determining majority status of a union.' " N.L.R.B. v. Flomatic Corporation, supra. See also, Pizza Products v. N.L.R.B., supra.

A significant number of employees testified that they signed the cards believing that their only effect would be to require a secret election under the auspices of the N.L.R.B. Some employees testified that union organizers and fellow employees soliciting union membership stated that the effect of signing the authorization cards would be to secure an election in which they would be free to vote for or against the union. The union and its organizers did not make known to all the employees that by presenting cards from a majority of Peoples' employees they could obtain recognition without an election. It appears from the testimony of a significant number of employees that they were misled by union organizers or fellow employees acting on behalf of the union into believing that the only purpose of signing the cards was to obtain an election. An important factor to be considered in determining whether an employer entertained a good faith doubt as to the union's majority status is whether the union misrepresented the purpose of the cards to the employees.

> "The decisions of the Board as well as the opinions of the courts place more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards. If in fact misrepresentations are made by the union to employees to the effect that the only purpose of the card is to authorize the union to petition the Board for an election, the card will not be construed to authorize representation, even though it contains language to that effect. N.L.R.B. v. Koehler, 328 F.2d 770 (C.A. 7); Englewood Lumber Company, 130 N.L.R.B. 394." N.L.R.B. v. Winn-Dixie Stores, Inc., supra.

See also, N.L.R.B. v. Cumberland Shoe Corporation, supra; Pizza Products v. N.L.R.B., supra; N.L.R.B. v. Gorbea, Perez & Morell S.En.C., 300 F.2d 886 (C.A. 1). Other employees stated that they were pressured into signing the cards and were promised that the Union would waive its initiation dues for all employees who signed prior to recognition. Several of these employees made these views known to their managers and to Mr. Weaver. Management could not know how widespread these views were. The Board's retrospective determination that the authorization cards of a majority of the employees were valid, does not necessarily negative an employer's good faith doubt at the time he refused recognition. Mr. Weaver testified that in nine other cases where a card check was refused and an election held, the Union lost the election. In N.L.R.B. v. Cumberland Shoe Corporation, supra, the company had no prior experience with elections or efforts to organize the employees. Previous

experience with card checks and union elections, is a factor which must be considered in determining the good faith doubt of an employer. N.L.R.B. v. Hannaford Bros. Co., supra. The evidence demonstrates that Mr. Weaver had good reason to believe that not all the cards were reliable.

We do not find, as claimed by the examiner, that anyone on behalf of Peoples ever conceded that the Union had a majority of signatures of the employees. The Examiner says that the widespread coercion indulged in by Peoples compels the conclusion that the advocacy of an election was a device to undermine the Union and to gain time and that its expressed doubt as to a majority was not made in good faith. This is pure supposition and, unlike N.L.R.B. v. Cumberland Shoe Corporation, supra, we do not find evidence to support such an inference.

The Examiner discredits Mr. Weaver's reasons for doubt. The Examiner assumes that the employees who told management that their cards did not represent their true intentions, did so to avoid the displeasure of their employer. It may as well be assumed that they were pressured into signing by fellow employees and union representatives. This is not a criminal case where Mr. Weaver must be persuaded beyond a reasonable doubt. An honest doubt is all that is required. A doubt in the mind of an individual is a subjective matter and cannot be precisely determined. While the absence of a doubt may be proved by circumstantial evidence, we conclude that, under the facts of this case, the Examiner's finding that Mr. Weaver, on

behalf of Peoples, did not have a good-faith doubt is not supported by substantial evidence.

We grant enforcement of the Board's order, except as to the requirement to bargain collectively with the Union.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 270

FURR'S INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 15-29), is not yet reported. The Board's Decision and Order (R. 78-81, 25-64)[1] are reported at 157 NLRB 387.

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[1] "R." refers to the portions of the record printed as a joint appendix in the court below.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1967, and a petition for rehearing was denied on March 24, 1967 (Pet. 2). The petition for a writ of certiorari was filed on June 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly held the employer responsible for the campaign of intimidation of union adherents conducted by its supervisory personnel.

2. Whether substantial evidence supports the Board's finding that a majority of the employees provided the union with valid authorizations to represent them for collective bargaining.

3. Whether the Board properly directed the employer to bargain with the union without first requiring the union to establish its majority in a Board election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 6-7 of the petition.

STATEMENT

A. The Board's Findings of Fact

1. In September 1964, the Union[2] began an organizing campaign at petitioner's Las Cruces, New Mexico store. On September 29, the first union meeting was held, attended by approximately 20 of petitioner's 49 employees (R. 32; 96, 177, 186, 192, 203). At this meeting, Union Representative Melendrez passed out authorization cards to the employees present (R. 33, 229).[3] Melendrez informed the employees that the card was to authorize the Union to represent them and that it would be necessary for 51 percent of the employees to so designate the Union in order to

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[2] The Retail Clerks International Association, Local Union No. 462, AFL-CIO.

[3] The form of the blank card read (R. 32-33, n. 7):

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated With the AFL-CIO)

AUTHORIZATION FOR REPRESENTATION

Desiring to enjoy the rights and benefits of collective bargaining, I, the undersigned, employee of the.....
..... Store address.....
(firm name)
Store No. ..... Employed as.....
(Job Title).
Dept. ..... Home Address .....
Phone..... Hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law.

....
(Date) (Signature of Employee)

give it that authority (R. 33, 99, 229, 125, 152-153, 192, 199-200, 219). Melendrez also stated that there was nothing binding on the cards, but that they were needed to show that the Union had the necessary support among the employees (R. 33; 88). Various possibilities concerning how the Union might obtain recognition were discussed (R. 100-101). Melendrez explained the procedure of a card check, indicating that under such a procedure the cards are submitted to a disinterested third party to authenticate the employees' signatures and to determine whether the Union actually represented a majority of the employees (R. 33; 192, 229).[4]

During the next nine days, more card signatures were solicited at union meetings and by prounion employees. By October 8, 32 of petitioner's 49 employees had signed cards (R. 34-35; 245-246; G.C.X. 2-4, 6-31, 33-34, 38).

2. In response to the Union's organizational campaign, Assistant Manager Luis Amador and Meat Department Manager Bill Harrison interrogated union adherents and threatened them with reprisals. For example, during the month of October, Amador questioned at least eight employees concerning their union activities and those of their fellow employees (R. 46-47, 50-51; 92, 260, 138, 145). When questioned, the employees usually denied participation in union activities (R. 47, 49, 50-51; 92, 260, 138, 145, 211). Ama-

[4] The card check procedure was also discussed at other union meetings held in early October (R. 101, 125-126, 132, 168, 215).

dor threatened one employee that, despite unionization, he could reduce the working hours of "all the help and the Union wouldn't have any control over that" (R. 50; 166). Amador also appeared at a union meeting and only left when requested to do so by a union representative (R. 46-47; 242-243). During the first half of October, Meat Manager Harrison discussed the Union with five female employees. Harrison warned that if the Union came in the employees would have to follow Company rules, that things would become "very unpleasant," and that if they made any mistakes they would be subject to discharge. In addition, he threatened that, within six months of the selection of the Union, there would be a whole new complement of employees. (R. 51; 125, 183-184, 200-201, 220). Harrison added that if the employees were not "smart enough to think for [themselves] and had to have someone represent [them they] weren't smart enough to work at Furr's," and that it was too bad they could not "tear up those little cards they had signed * * * [they] just signed [their] rights away" (R. 184).

On October 13, Vice President Arnold visited the Las Cruces store and conducted a number of talks with small groups of employees (R. 52; 273). With each group he discussed the control methods used by management to survey employee accuracy in handling money and to check their courtesy and service to customers, in an attempt to clear up what he believed was the employees' misunderstanding concerning the rea-

sons for the firing of Joe Barreras (R. 62; 272-274).[5] Arnold also told the employees that the Company had filed, on October 12, a petition for a representation election with the National Labor Relations Board. This election, he advised them, would allow them to express their wishes about whether they did or did not want a union (R. 52-53, 275). He further stated that it was "Furr's policy" to leave this choice to the employees and not to discriminate against employees because of union activity (R. 53; 275-276). In addition, Arnold asked whether there were any complaints about Meat Manager Harrison, adding that "now was the time to voice them" (R. 53; 285).[6] No complaints were made to Arnold at this time because "Harrison was standing right there" (R. 184).

After Arnold's visit, Assistant Manager Amador interrogated at least three employees concerning their union activities. He told two of them that "if they got a union they wouldn't have a job very long." (R. 175.)

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[5] Arnold and other members of management asserted that they thought the employees wanted to unionize because of their "misunderstanding" of the procedures which led to the discharge of employee Joe Barreras (R. 44, 52; 273, 306, 325-326). The Company fired Barreras for misappropriating store funds (R. 152; 272-273). Some employees were initially motivated to unionize by the Barreras incident (R. 45; 180).

[6] During the union campaign, Harrison started carrying around a small black book in which he recorded mistakes of employees as he observed them (R. 51; 185, 307). He told an employee that the purpose was "to show [the Union] why he had fired him" (R. 52; 131-132). The store manager, after a complaint from an employee, told Harrison to get rid of the book (R. 307).

3. Meanwhile, on October 8, Union Representative Miehls informed Vice President Don Furr that the Union had obtained authorization cards from a majority of the employees at the Las Cruces store and requested recognition (R. 38; 235-236, 291). Furr replied that the Las Cruces store was part of an operating division of the Company over which he had no direct responsibility, but he agreed to inform Vice President Arnold and Senior Vice President Bouverie, who were responsible for its operations (R. 36; 291-292). The two men also discussed the possibility of a card check and Furr indicated his tentative approval of this system (R. 35-36; 236-237, 293-294). As a consequence of this conversation, Miehls wrote Furr a letter which again informed the Company of the Union's card majority and requested recognition (R. 36-37; 237-238; G.C.X. 32).

The following day, Personal Director Hurmence called Miehls and told him that he had talked with Furr and had received the Union's letter (R. 37; 238-239, 318-319). The conversation turned to the matter of a card check, with Miehls asserting that Furr had agreed to one, and Hurmence saying that there had been a misunderstanding and that an election should be conducted to determine the Union's majority status (R. 37-38; 239, 318). Additional conversations occurred between the parties without any agreement being reached (R. 38-40; 239-240, 257, 295-296, 319, 325). After talking with Miehls on October 9, Hurmence discussed with Bouverie and Arnold the Union's request for recognition. Bouverie remarked that the

employees were "upset" by the discharge of Barreras (*supra*, n. 5). Arnold agreed, stating that he felt Barreras' discharge had been "misrepresented" to the employees and that therefore a representation petition should be filed to test the Union's support (R. 40, 282-283).

As noted (*supra*, p. 6), on October 12, the Company filed a representation petition. The petition sought an election among the employees in a unit which excluded all "supervisors" and all meat departmental personnel (R. 40-41; 274). Two days later, the Union filed an unfair labor practice charge (R. 25). On December 15, the Board issued a complaint against the petitioner based upon this charge, as amended (R. 25). On December 16, the Board's Regional Director dismissed the Company's petition for an election because of the pending unfair labor practice complaint.

B. The Opinions Below

The Board held that the Company was responsible for the conduct of Amador and Harrison and that such conduct violated Section 8(a)(1) of the Act (R. 79-80). The Board further concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (R. 80).

In reaching the latter conclusion, the Board found that "Amador and Harrison's illegal activity, for which [petitioner] is responsible, made the holding of a fair election impossible and reflected a rejection of the collective-bargaining principle" (R. 80). The

Board also rejected the Company's contention that the authorization cards submitted by the Union had been procured under the misrepresentation that they would be used only to obtain a Board election, and were, therefore, insufficient to establish the Union's majority. The Board found that the solicitors emphasized "the need to secure representation through the Union and the benefits to be derived from such representation" (R. 43).

The Board's order, *inter alia*, requires the Company to bargain with the Union, "both to remedy its violation of Section 8(a)(5) and its violations of Section 8(a)(1) of the act" (R. 80).

The court of appeals enforced the Board's order in full (App., *infra*, pp. 15-29).

ARGUMENT

1. Petitioner does not deny that the conduct found to violate Section 8(a)(1) of the Act occurred. Rather, petitioner contends (Pet. 21) that it may not be held responsible for this conduct which it claims was contrary to Company policy. However, as this Court long ago held, employer responsibility is to be determined not by strict rules of agency but by whether "the employees would have just cause to believe that [the individuals involved] were acting for and on behalf of the management * * *." *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 80. Accord: *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 179 (C.A. 2). The facts summarized in the Statement (*supra*, pp.

4-6) amply support the conclusion of the court of appeals that (App., *infra*, pp. 22-23) "it is clear that the employees felt coerced; they repeatedly resisted Amador's efforts to learn about their union activities. * * * [W]e think the employees could and did justifiably conclude that the acts of Amador and Harrison reflected company policy, despite Arnold's October 14 statement which was couched in general terms and did not repudiate any of the supervisors' specific acts."

2. Petitioner contends (Pet. 12-13, 28-30) that the authorization cards could not prove the majority status of the Union because the signers did not intend to authorize representation, but meant only to request that an election be held. This factual question, peculiar to this case, was decided adversely to petitioner by the Trial Examiner, the Board, and the court below, and is thus not appropriate for review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, petitioner's contention is contradicted by the record. As the court below found (App., *infra*, p. 23), the "cards executed in this case were certainly unambiguous in authorizing the union to act as the employees' bargaining agent." The record clearly supports the Board's finding that the union organizers did not misrepresent the purpose of the authorization cards.[7] It has consistently been held

[7] Employees Rosas, Cano, and McLane testified that at the meeting where signatures were solicited union organizer Melendrez explained that the purpose of the cards was to give the union the right to represent the employees. He also ex-

that, absent any misrepresentation by the union organizer, unambiguous authorization cards constitute a valid designation of the union's representative status, and that they may not be impeached by testimony of employees, given long after the cards were obtained, that they had a different intention. See, *e.g.*, *National Labor Relations Board* v. *Winn-Dixie Stores*, 341 F. 2d 750, 755 (C.A. 6), certiorari denied, 382 U.S. 830; *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 920 (C.A. 6) (and cases cited); *Jas. H. Matthews & Co.* v. *National Labor Relations Board*, 354 F. 2d 432, 436-438 (C.A.

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plained the card check procedure. See *supra*, p. 4 (R. 33, 192, 125, 229). Several other employees confirmed that the organizer stated that the purpose of the cards was to authorize representation. (R. 33; 152-153, 200, 219). The record pages cited by petitioner at pp. 12-13 of the petition reveal the following: employees Archuleta, Witherwax, Chavarrio and Samaningo testified that an election was mentioned but did not say that they were told it was the sole function of the cards. Archuleta stated that the purpose of the cards was to be "represented" by the union. J. Montoya, F. Montoya, and Holguin did not say what, if anything, they were told prior to signing the cards. Guitterez testified that when he signed the card nothing was said about an election. Brunson and Gonzalez were not told there would be an election, and Ruiz was told that if he signed a card there would *not* be an election. Delgada was told that there would be an "election first," but was also told that the purpose was to be "associated" with the union supporters. The following employees testified that their intent in signing the cards was to obtain an election: Mims, Chavez, O'Neil, and Samanego. O'Neil stated, however, that he was not *told* that the card was to obtain an election. Mary Jackson did testify that she understood Melendrez to say that the purpose of the cards was to have an election but she admitted that she had read the card prior to signing it. See also App., *infra*, p. 25.

8), certiorari denied, 384 U.S. 1002; *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914.[8]

3. There is no merit to petitioner's contention (Pet. 15-18) that an employer has an absolute right to an election before he is required to bargain with a union claiming majority representation. Although Section 9(c) of the Act provides election machinery by which a "question of representation" may be resolved, it is well settled that this is not the exclusive means by which representative status may be established. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8; *Jas. H. Matthews & Co.* v. *National Labor Relations Board*, 354 F. 2d 432, 436 (C.A. 8), certiorari denied, 384 U.S. 1002. Thus, Section 9(a) provides that "Representatives *designated or selected* for the purposes of collective bargaining by the majority of the employees in the unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit * * *" (emphasis supplied). And Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the represenatives of his employees, subject to the provisions of section 9(a)." See, also, H. Rep.

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[8] There is no conflict between the decision below and the recent decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *S.E. Nichols Company*, 65 LRRM 2655 (June 21, 1967, Docket No. 395). While the identical cards were involved in that case, the court's refusal to enforce the Board's bargaining order was based on the finding that the union organizers had actually misrepresented the purpose of the cards.

No. 245, 80th Cong., 1st Sess. 30, and H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41; 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 321, 545.

Contrary to petitioner's contention (Pet. 2-3, 19-20), the decision in the instant case does not conflict with *Peoples Service Drug Stores, Inc.* v. *National Labor Relations Board* (C.A. 6), April 5, 1967 (Pet. App. 33-46). In *Peoples*, the court concluded that, despite the employer's unfair labor practices, the circumstances of his refusal to recognize the union were such that it could not be said that he lacked a good-faith doubt as to the union's majority status. The court noted that several employees had informed the employer that, despite signing authorization cards, they opposed the union (Pet. App. 44). It further found that union solicitors had misrepresented the purpose of the authorization cards, claiming they were *only* for the purpose of securing an election (Pet. App. 43). Here, on the other hand, there was no evidence to support petitioner's claim that it had a good-faith doubt as to the majority status of the union. Despite petitioner's present claim that the employees were confused as to the purpose of the authorization cards, there was no evidence that the company officials who refused to bargain had any reason to believe that the union had misrepresented the purpose of the authorization cards. The only reason offered for the Company's refusal to bargain was the belief of its officers that the employees who joined the union had been confused about the reason for the discharge of a

fellow employee. However, even if there was such confusion, this could not change the fact that a majority of the employees had freely authorized the union to represent them. The refusal of the Company to bargain with the union in these circumstances, together with the Company's campaign of coercion of union adherents, clearly rebuts the argument that the Company had a good-faith doubt of majority status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
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JULY 1967.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January 1967 Term

No. 8686

FURR'S, INC., PETITIONER

vs.

* NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition to Review and Cross Petition to Enforce the Order of the National Labor Relations Board

James H. Milam for Petitioner.

Anthony J. Obadal (Arnold Ordman, Dominick L. Manoli, Marcel Mallet-Prevost and Elliott Moore with him on brief) for Respondent.

Before MURRAH, Chief Judge, ALDRICH* and SETH, Circuit Judges.

MURRAH, Chief Judge

In this unfair labor practice proceedings the Board found the employer guilty of conduct violative of § 8(a)1 of the Act, and of refusal to bargain in violation of § 8(a)5. The employer was ordered to cease and desist from the 8(a)1 conduct and from refusing to bargain; affirmatively it was ordered to bargain

* By special designation.

upon request and to post appropriate notices. On petition for review and cross-petition for enforcement the dispositive issues are (1) whether the employer was responsible for the 8(a)1 conduct, (2) whether the union timely attained majority status, (3) whether the employer entertained a good faith doubt of such majority status, and (4) whether in all events an election must be held prior to collective bargaining. We enforce the order.

The petitioning employer, Furr's, Inc., operates an interstate chain of retail supermarkets. Its Las Cruces, New Mexico, store was the subject of a union [1] organization drive in the autumn of 1964. This store is under the direct control of a store manager and the general management of the home office. It has 49 nonsupervisory employees in four departments (grocery, meat, produce and drug). By October 8 a total of 28 employees had executed union authorization cards, and on that date the union notified the employer that it represented a majority of store employees and requested recognition as their bargaining agent.[2] It was found and it is not disputed that that although no unit was specifically defined in the bargaining demand, the clear implication was that the union sought a storewide unit (including meat department personnel).[3] In its demand the union offered to demonstrate

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[1] Retail Clerks International Association, Local No. 462, AFL-CIO.

[2] At contract negotiations held on October 6 concerning another Furr's store, a union official informed a Furr's representative that the union also represented a majority of the Las Cruces employees. However there apparently was no formal bargaining demand at this time.

[3] The trial examiner also found, and it is not disputed, that the bargaining demand was validly made and that a storewide unit is an appropriate unit.

its majority status by means of a card check, but the offer was neither accepted nor rejected. On that same day, after the bargaining demand was made, four more employees signed union cards. Thereafter several communications passed between union and employer representatives; these were inconclusive, although an employer desire for an election was indicated. In any event recognition was not extended, and on October 12 Furr's filed a representation petition seeking an election among employees in a unit which excluded meat department personnel. This, the trial examiner found, signaled the rejection of the October 8 bargaining demand. The union subsequently filed unfair labor practice charges, and on December 15 the Board issued a complaint against Furr's. The following day the Regional Director dismissed Furr's representation petition, and the Board upheld that dismissal. A petition for review of the Board's action was dismissed by this court in Furr's, Inc. v. N.L.R.B., 350 F.2d 84.

We consider first the § 8(a)1 finding, for as we shall see infra., it is crucial to the consideration of the § 8(a)5 findings. The trial examiner found that during the month of October, both before and after the October 8 bargaining demand, assistant store manager Amador and meat department head Harrison engaged in the following activities: Amador attended a union meeting, interrogated employees concerning union activities, and threatened reprisals should the union be recognized; Harrison also threatened reprisals, and for the first time began recording employee mistakes ostensibly as justification for future disciplinary action. The examiner further found that this extensive conduct [4] occurred largely on store

[4] The interrogation and threats involved some 15 different employees.

property during working hours, that Amador and Harrison were "supervisors" within the meaning of § 2(11) of the Act, and that Furr's was responsible for their conduct. Furr's does not dispute that Amador and Harrison committed the acts found or that those acts are the type violative of § 8(a)1. Instead it asserts nonliability on the theory that it should not be held responsible for their conduct. In this connection we first examine the finding that Amador, Harrison and a third employee, produce department head Morgan, are supervisors.[5]

Section 2(11)[6] is to be read in the disjunctive, and supervisory status is determined by the existence of any of the statutory powers in the employee and not the frequency of exercise. See Jas. E. Matthews and Co. v. N.L.R.B., 354 F.2d 432, 434 and cases cited. But, the power must be exercised in the interest of the employer, Id. 435. Finally, since the determination involves the specific application of a broad statutory term by the agency administering the statute, the Board's finding will be accorded appropriate weight, Id. 435; the Board "must be permitted 'a

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[5] Supervisory status is relevant not only to the responsibility issue, but also to the majority status issue considered infra; if Amador, Harrison and Morgan are not supervisors, the number of nonsupervisory employees in the uint increases to 52, and the required majority from 25 to 27.

[6] "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

large measure of informed discretion' ". N.L.R.B. v. Elliott-Williams Co., 345 F.2d 460, 463, citing and quoting from N.L.R.B. v. Swift and Co., 292 F.2d 561.

Furr's relies primarily on testimony of company officials concerning the company policy that only store managers have authority to hire and fire; that while store manager Ellington received recommendations from these three employees on personnel and work schedule matters, he nevertheless exercised his independent judgment. There was employee testimony, on the other hand, to the following effect: Amador is in charge of the store when Ellington is absent, and on occasion passes on requests for "break time" and receives employee reports of absence due to illness; Harrison directs the work of the employees in the meat department, and has authority to grant time off, to hire, and to make small purchases of meat; both Amador and Harrison are regarded by the employees as their "bosses"; Morgan directs the work of employees in the produce department, and has authority to grant time off, to hire, to arrange vacation schedules, and on occasion receives reports of absence due to illness; and, while all three men do manual labor similar to that done by other employees in their departments and are paid at an hourly rate, the rate for Amador and Harrison is higher than for any other employee, and the rate for Morgan is the same as for the other highest paid employees. The examiner credited this employee testimony, and considered it sufficient to bring Amador, Harrison and Morgan within the statutory definition.[7] Finding no reason to disturb the

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[7] If Amador, Harrison and Morgan are not supervisors, Ellington must supervise more than 50 employees in four departments, and when he is absent the store is unsupervised. This seems unlikely. See Vega v. N.L.R.B., 341 F.2d 577.

examiner's credibility judgment, we agree that the statutory definition has been met.[8]

But, Furr's contends that even if Amador and Harrison were supervisors, their proscribed conduct was carried out in their individual capacities and did not bind Furr's. Ordinarily, a finding of supervisory status is sufficient to charge the employer with responsibilty, see e.g. Jas. E. Matthews and Co. v. N.L.R.B., supra; N.L.R.B. v. American Manufacturing Co. of Texas, 351 F.2d 74. But, this is not a necessary result, see e.g. Imco Container Co. of Harrisonburg v. N.L.R.B., 346 F.2d 178. The definition of "employer" in § 2(2) of the Act includes "any person acting as an agent of an employer, directly or indirectly", and § 2(13) provides that "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." It is clear that these provisions are in complete harmony with prior decisions of the Supreme Court in International Association of Machinists, etc. v. N.L.R.B., 311 U.S. 72, and H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514, to the effect that employer responsibility is not to be determined according to the strict rules of agency. See N.L.R.B. v. Arkansas-Louisiana Gas Co., 333 F.2d 790; Local 636, Etc., Plumbing and Pipe Fit. Ind. of U.S. v. N.L.R.B., 287

[8] The Board is not estopped from considering the status of these three employees because in a previous election in 1960 at the same store the same union agreed to include the assistant manager and department heads in the bargaining unit. See N.L.R.B. v. Elliott-Williams Co., supra, where a union stipulation in a representation hearing that an employee should be included in the unit did not estop the Board from inquiring into his status and finding him a supervisor.

F.2d 354; and see N.L.R.B. v. Albuquerque Phoenix Express, Nov. 16, 1966, 368 F.2d 451. "We are dealing here not with private rights * * * nor with technical concepts pertinent to an employer's legal responsibility to third persons * * * but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." International Association of Machinists v. N.L.R.B., supra, 80. The test was recently stated in Irving Air Chute v. N.L.R.B., 350 F.2d 176, 179, "* * * [T]he employer [is responsible] for acts of a supervisor when 'employees would have just cause to believe that he was acting for and on behalf of the company'." Citing and quoting from N.L.R.B. v. Texas Ind. Oil Co., 232 F.2d 447. And see N.L.R.B. v. Continental Oil Co., 121 F.2d 120.

Furr's position is that in the only instance where the activities of Amador and Harrison were called to the attention of Ellington (an employee told him that Harrison was recording employee mistakes in a black book), Ellington immediately put a stop to it; that otherwise he had no knowledge of their conduct; that Furr's policy is one of strict neutrality and non-discrimination against employees engaging in union activities; that this policy is given substance by Furr's history of amicable relations with this union at other of its stores; that the employees were well aware of this policy before the organization campaign began, and it was reiterated to them by Furr's Vice President Arnold at an employee meeting on October 14. The trial examiner rejected Furr's contention saying that the statements of Amador and Harrison "* * * were neither casual nor isolated, and they were made, principally, on company premises, during working hours over a considerable period of time. These coer-

cive statements by supervisors * * * were, in the circumstances, attributable to Respondent, and, as they ran directly counter to the avowed policy of Respondent, were not expiated or expunged by Arnold's reiteration of employee freedom to organize."

We considered this very problem in two cases decided only days apart. See Utah Copper Co. v. N.L.R.B., 139 F.2d 788; Boeing Airplane Co. v. N.L.R.B., 140 F.2d 423. In Utah Copper we felt that considering all the circumstances, the employer was responsible for the supervisor's statements, although, as here, there was much to be said for the contrary result.[9] In Boeing, on the other hand, we held the employer was not responsible under the circumstances (which included a relatively few coercive statements).

Considering the nature and extent of the conduct and the conditions under which it occurred, we hold that there is substantial support in the record for the Board's finding. It may be that Ellington did not know about the activities of Amador and Harrison, other than the latter's notebook keeping, and there is no evidence that any higher Furr's official knew about their conduct. Nevertheless, it is clear that the employees felt coerced; they repeatedly resisted Amador's efforts to learn about their union activities. Indeed, when Vice President Arnold met with meat department employees in the presence of Harrison and asked if they had any complaints about him, none was voiced because as one employee put it, "Mr. Har-

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[9] See Judge Phillips' dissent, pointing out that the statements were made in violation of positive instructions to refrain from such conduct, that these instructions were known by the employees, and that the employer repeatedly disavowed the supervisors' statements. Judge Phillips also points out that the policy of non-discrimination was in fact adhered to by the employer.

rison was standing right there." Under the admonition of International Association of Machinists v. N.L.R.B., supra, we think the employees could and did justifiably conclude that the acts of Amador and Harrison reflected company policy, despite Arnold's October 14 statement which was couched in general terms and did not repudiate any of the supervisors' specific acts.[10]

Turning to the 8(a)5 findings, it is clear that "An employer's refusal to bargain is an unfair labor practice when a union has been designated by a majority of employees in an appropriate unit, and that refusal is not in good faith." N.L.R.B. v. George Groh and Sons, 329 F.2d 265, 268. Furr's argues that the union did not in fact represent a majority of the employees on the theory that a number of cards were executed in reliance upon representations that the purpose of the card was to get an election.

The cards executed in this case were certainly unambiguous in authorizing the union to act as the employees' bargaining agent.[11] This being so, any em-

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[10] See also NLRB v. Fairmont Creamery Co., 144 F.2d 128; Consumers Power Co. v. NLRB, 113 F.2d 38; Solvay Process Co. v. NLRB, 117 F.2d 83; NLRB v. Continental Oil Co., supra; Cf. NLRB v. Tennssee Coach Co., 191 F.2d 546; NLRB v. Shenandoah, Etc., 145 F.2d 542; N.L.R.B. v. Reynolds International Pen Co., 162 F.2d 680; Humble Oil and Refining Co. v. NLRB, 113 F.2d 93; N.L.R.B. v. J.L. Brandeis and Sons, 145 F.2d 556.

[11] The cards are entitled "Authorization for Representation", and in pertinent part read as follows: "Desiring to enjoy the rights and benefits of collective bargaining, I * * * hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law."

ployee misconception as to the operative effect of the card will not ordinarily invalidate it. See NLRB v. Cumberland Shoe Corp., 351 F.2d 917, and cases cited; Matthews and Co. v. NLRB, supra. However, if execution of the card is induced by representations that its sole purpose is to obtain an election, it cannot be included in computing the union's majority. See NLRB v. Cumberland Shoe Corp. supra; Matthews and Co. v. NLRB, supra; NLRB v. Gotham Shoe Manufacturing Co., Inc., 359 F.2d 684; Happach v. NLRB, 353 F.2d 629; NLRB v. Koehler, 328 F.2d 770.[12] Applying this test, the trial examiner concluded that none of the authorization cards was tainted because executed on the basis of representations that its sole or even principal purpose was to secure an election, and that all cards introduced at the hearing, which included the four executed after the bargaining demand was made, could thus be counted to establish the union's majority.[13]

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[12] Furr's relies on the Koehler case for the proposition that the card is invalid if induced by the representation that it will be used to get an election. However, the later Happach case makes it clear that the Seventh Circuit test set forth in Koehler is whether the card was induced by representation that its sole purpose was to obtain an election.

[13] The cards received on October 8, after the bargaining demand was made, were properly counted, since at that point the proposed card check had neither been accepted nor rejected. See N.L.R.B. v. Gotham Shoe Manufacturing Co., Inc., supra, where cards executed after the bargaining demand was made but before the employer responded were included in computing the union majority. Note Judge Timbers' dissent at p. 693. See also N.L.R.B. v. Burton-Dixie Corp., 210 F.2d 199; Local No. 152, International Brotherhood of Teamsters v. N.L.R.B., 343 F.2d 307; Scobell Chemical v. N.L.R.B., 267 F.2d 922.

The union possessed 32 cards, and even if 7 are invalid, the union would still hold a majority of 25 valid cards. A strong case can be made for invalidity of 4 of the cards.[14] But, we need not decide the validity of these 4 cards, for there is no substantial evidence that the other cards challenged by Furr's were executed on the representation that their sole purpose was to get an election.[15]

Furr's also contends that the union's majority is invalid because acquired as the result of employee resentment arising out of the discharge of the employee Barreras. The reason for this discharge (misappropriation of company funds) was not revealed until Vice President Arnold made his speech to the employees on October 14. The argument is that until then the employees felt he had been unjustly fired, and if the facts had been known, many of the employees who signed before October 14 would never have signed. It seems sufficient to note that there is substantial evidence in the record that before the union came on the scene the employees felt Barreras was unjustly discharged and this was one reason the employees turned to the union. Unlike N.L.R.B. v. Bonnie Enterprises, Inc., 341 F.2d 712, and N.L.R.B. v. Schapiro & Whitehouse, Inc., 356 F.2d 675, there is nothing in the record to indicate that the union in any way instigated

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[14] Four employees signed at a meeting at the home of employee Aaron, at which Aaron, in response to an inquiry whether signing automatically resulted in employee representation by the union, answered that there "had to be an election first." It is, however, questionable whether in making this statement Aaron was the union's agent. See Matthews and Co. v. N.L.R.B., supra, p. 437.

[15] There is much confusion and conflict in the record as to whether the union representatives said anything at all about an election at the various meetings.

or inspired the sentiment, even though it may have been a motivation for pro-union sentiment. We agree with the trial examiner that the union timely attained a valid majority status.

The next argument is that even if the union timely attained a valid majority status, Furr's entertained a good faith doubt thereof and its refusal to bargain did not violate 8(a)5. The trial examiner, relying on both Joy Silk Mills v. N.L.R.B., 185 F.2d 732, and on Snow v. N.L.R.B., 308 F.2d 687, found that Furr's did not in good faith doubt the union's majority, but that, as reflected by its filing of a representation petition seeking an election and by the conduct of Amador and Harrison, the refusal to bargain was "for the purpose of gaining time to undermine the union". While the Board also found an 8(a)5 violation, it did not rely on Snow v. N.L.R.B., supra, stating in a footnote that "The record does not establish that Respondent's filing of an RM petition on October 12, was in bad faith." The Board instead relied solely on the conduct of Amador and Harrison, and citing Joy Silk Mills v. N.L.R.B., supra, stated that their conduct "* * * made the holding of a fair election impossible and reflected a rejection of the collective bargaining principle."

Furr's asserts that the finding of bad faith is based on speculation, and that even the Board recognized this in stating that the record did not establish that the October 12 representation petition was filed in bad faith. As affirmative evidence of good faith, it points to its clear policy of neutrality in the union affairs of its employees; its amicable union relations, including voluntary recognition of this union without an election at some of its other stores; its feeling that union sentiment would evaporate with the explanation of the reason for Barreras' discharge; the fact that no specific unit was ever agreed upon; the testimony of

Furr's officials that they in good faith doubted the union majority; and the continuing efforts of Furr's as evidenced by its previous petition decided 350 F.2d 84 to obtain an election in which its employees may freely express their will.

Good faith is a factual issue, and again we must look to the record to see if it contains substantial support for the Board's findings. We must say that the Board's decision on this point is confusing. If taken out of context, its finding that the representation petition was not filed in bad faith would seem to end the matter favorably to Furr's. However, as noted above, this finding was made in conjunction with the Board's decision not to place reliance on Snow, and an understanding of that case is helpful in understanding what the Board meant. In Snow the employer agreed to a card check which was held and revealed a union majority. But, the employer still refused to bargain, insisting that an election be held. The court felt that under those circumstances, continued insistence on an election in itself manifested a lack of good faith as to the union's majority, even though it was not charged that such insistence was for the purpose of undermining the union. In that regard the Joy Silk Mills case was distinguished. The court was of the opinion that proof of a motivation to undermine the union is not essential to a finding of bad faith if lack of a reasonable doubt as to the union's majority is manifested in some other way, i.e., by insistence on an election in the face of a proven union majority. It is thus clear that the Board treated our case as a Joy Silk Mills case and not a Snow case, at least to the extent that continued insistence on an election did not in and of itself reflect bad faith.

A number of recent cases have held, following Joy Silk Mills, that 8(a)1 conduct designed to disrupt and

coerce the employees in the exercise of their statutory rights is strong evidence of a lack of good faith doubt of the existnce of a union majority. See Jas. E. Matthews and Co. v. N.L.R.B., supra; N.L.R.B. v. Cumberland Shoe Corp., supra; N.L.R.B. v. Gotham Shoe Manufacturing Co., Inc., supra; N.L.R.B. v. Purity Food Stores, 354 F.2d 926; N.L.R.B. v. Allegheny Pepsi-Cola Bottling Co., 312 F.2d 529. And see N.L.R.B. v. Hamilton, 220 F.2d 492. We, of course, judge the issue of good faith against Furr's history of amicable union relations, including voluntary recognition of this union at some of its other stores. Secondly, it may be that the employer thought, although erroneously, that the card majority was generated by union misrepresentation concerning the reason for the discharge of Barreras. Finally, it also seems clear from the record that the Furr's officials responsible for rejecting the bargaining demand did not authorize the anti-union conduct of the supervisors, and it may well be they had no actual knowledge of it. But, at the same time, we have affirmed the Board's finding that the 8(a)1 conduct represented company policy at this store, a policy of interference and coercion. In these circumstances we think the Board was justified in concluding that the company could not prevail on a claim of good faith refusal to bargain in the face of an attempt by its supervisors to undermine the union. As we have noted, case law leaves no doubt that 8(a)1 conduct is cogent evidence of lack of good faith. And moreover, as Chief Judge Aldrich put it in N.L.R.B. v. Purity Food Stores, supra, 927, "By its clearly established 8(a)1 violations, it [the employer] is barred from asserting a good faith, although erroneous, doubt * * *."

Furr's final argument is that its employees are entitled to an election as a prerequisite to collective bargaining. No case is cited in support of this proposition; instead, Furr's contends that upon filing its representation petition, an election pursuant to § 9(c) is mandatory. The court in Jas. E. Matthews and Co. v. N.L.R.B., supra, fully considered and disposed of this issue and concluded by stating that "* * * it is well-settled that an election is not the exclusive instrumentality by which a Union's representative status may be established." Id. 436. And see N.L.R.B. v. Hamilton Co., 220 F.2d 492; N.L.R.B. v. Albuquerque Phoenix Express, supra. And, the Board's policy of not conducting a representation election while unfair labor practice charges are pending has long met with court approval. See N.L.R.B. v. Auto Ventshade, 276 F.2d 303; N.L.R.B. v. Trimfit of California, 211 F.2d 206.

The Board here issued the bargaining order to correct both the 8(a)5 and 8(a)1 [16] violations and in its brief states that an election may be held when the unfair labor practices have been remedied by a reasonable period of collective bargaining. "It is the function of the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." N.L.R.B. v. Hamilton Co., supra, 494; see also Franks Bros. Co. v. N.L.R.B., 321 U.S. 702.

The order shall be enforced.

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[16] See N.L.R.B. v. Delight Bakery, Inc., 353 F.2d 344, where the court upheld a bargaining order although only violations of 8(a)1 were involved.

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